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No.

IN THE

Supreme Court of the United States

October Term, 1983

BIO/BASICS INTERNATIONAL CORPORATION,
Petitioner,

v.

ORTHO PHARMACEUTICAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether New York law immunizes an unsubpoenaed witness who appears before a congressional legislative subcommittee from a subsequent lawsuit based upon his testimony before the subcommittee?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ: The Court of Appeals Has Decided an Important State Question Concerning the Scope of Absolute Immunity in a Way in Conflict with Applicable State Law and Public Policy	5
Conclusion	10
Appendix—Order of the Second Circuit Court of Appeals	1a

TABLE OF CITATIONS

Page

Cases Cited:

Andrews v. Gardiner, 224 N.Y. 440 (1918) 5,6,2a

Miscellaneous:

Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875 (1956) 8,9

Note, Protection from Defamation in Congressional Hearings, 16 U. Chi. L. Rev. 544 (1949) 9

Veeder, Absolute Immunity in Defamation: Judicial Proceedings 9 Colum. L. Rev. 463 (1909) 7,8

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was unpublished and appears in the appendix hereto. The opinion of the District Court is reported at 545 F.Supp. 1106 (S.D.N.Y. 1982).

JURISDICTION

The petitioner Bio/Basics International Corporation respectfully prays that a writ of certiorari issue to review a Judgment and unpublished opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 17, 1983, and this petition for certiorari was filed within 90 days of

that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Ortho is a subsidiary of Johnson and Johnson, Inc., and is primarily engaged in the manufactured, distribution, and sale of pharmaceutical and medical products. Bio/Basics devotes its activities in large part to matters undertaken on behalf of companies, such as Ortho, that manufacture pharmaceutical products.[1] Among other things, Bio/Basics offers its clients assistance in the testing of new therapeutic substances. The services that Bio/Basics customarily makes available to a client for this purpose include: (1) locating "clinical investigators" who are qualified and willing to engage in testing new therapeutic substances; (2) furnishing administrative services necessary for such testing to be conducted; (3) forwarding the results of such testing to the client, that is, to the manufacturer of the substance being tested; and (4) communicating and consulting with the client on various matters relating to such testing.

Beginning in September, 1975, Ortho and Bio/Basics entered into a series of contracts whereby Bio/Basics agreed to retain the clinical investigators necessary to conduct studies relating to the safety and efficacy in humans of a drug known as "suprofen." Suprofen is a non-narcotic analgesic agent designed to relieve mild to moderate pain. In these contrasts, Bio/Basics further agreed to retain a group of recognized academic experts to conduct a "peer group review" of the studies of suprofen that were to be performed by clinical investigators. The

"clinical investigation" and "peer group review" that Bio/Basics agreed to conduct on Ortho's behalf were undertaken for the purpose of supporting a "New Drug Application" ("NDA") that Ortho intended to file with the approval of suprofen for marketing to the general public in the United States. Bio/Basics alleges that it fully and properly performed all of its obligations under these contracts.

On October 11, 1979, George A. Braun, Ortho's Vice-President for Scientific Affairs, appeared before the Sub-committee on Health and Scientific Research of the Committee on Labor and Human Resources of the United States Senate ("the Senate Subcommittee"), which was at that time conducting hearings on fraud and abuse in the testing of new drugs on human subjects. While Braun had not been subpoenaed to testify, his appearance was pursuant to the Senate Subcomittee's specific request that someone from Ortho provide information about the clinical studies conducted on suprofen for Ortho by Bio/Basics. Braun's testimony consisted of a prepared statement, which he read into the record with the permission of Senator Edward M. Kennedy, Chairman of the Senate Subcommittee, and also of answers to certain questions posed by Senator Kennedy. In his prepared statement, Braun first described the aforementioned contractual relationship between Ortho and Bio/Basics. He then told the Senate Subcommittee that the clinical studies of Suprofen contemplated by the Ortho-Bio/Basics contracts had been completed by late 1977 and that Ortho had filed its NDA for Suprofen in October 1978. According to Braun, the FDA, in the course of processing Ortho's NDA for Suprofen, reviewed the data submitted by certain of the clinical investigators retained by

Bio/Basics and advised Ortho that the data might be "worthless." Ortho responded to its receipt of this information, said Braun, by commencing a complete review of all the documents relating to the Bio/Basics study of Suprofen. Braun's statement then asserted that Ortho's review of Bio/Basics' Suprofen study showed that the "peer group review" contemplated by the contracts with Bio/Basics "had not been utilized as originally anticipated," and that "data from many of the [Bio/Basics] studies [were] not usable or [were] usable only to a limited extent."

Bio/Basics responded to Braun's testimony before the Senate Subcommittee by commencing this lawsuit. According to the complaint, Braun's statement to the Senate Subcommittee contained false and misleading information and was made by Braun with the knowledge that it contained such information and with the intent of injuring Bio/Basics. Several existing and potential clients of Bio/Basics, located in various states of the United States, including New York, learned of Braun's statement to the Senate Subcommittee. As a direct result of Braun's statement, two clients of Bio/Basics, including one client located in New York, terminated their contracts with Bio/Basics, and two potential clients of Bio/Basics, one of which was located in New York, terminated their precontractual relations with Bio/Basics. The complaint alleges that Braun knew of these contractual and precontractual relationships when he made his statement to the Senate Subcommittee and that his statement was intended to interfere with those relationships. Accordingly, the complaint alleges that, by virtue of Braun's statement, Ortho tortiously interfered with contractual relations between Bio/Basics and its clients, tortiously interfered with

precontractual relationships between Bio/Basics and its potential clients, committed a breach of the fiduciary relationship between Bio Basics and Ortho, and defamed Bio/Basics.

The judgment rendered by the District Court was affirmed by the Court of Appeals. The Court of Appeals held, in short:

> "Appellant cites *Andrews v. Gardiner,* 224 N.Y. 440 (1918), in support of its claim that voluntary testimony is entitled only to a qualified privilege. But *Andrews* involved statements made in an application for a pardon. At most, that case may suggest that someone who appears unasked before a legislative committee and is allowed to testify might be entitled only to a qualified privilege. In this case, however, Braun appeared at the request of the Senate subcommittee. We believe that the distinction between a Senate request to testify and a subpoena to testify is insignificant in this context, since the committee that makes the request has the power to enforce it with a subpoena. Accordingly, we reject appellant's argument that to confer immunity on Braun would unnecessarily extend the scope of absolute privilege under New York law."

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important state question concerning the scope of absolute immunity in a way in conflict with appicable state law and public policy.

It is undisputed that "on October 11, 1979, George A. Braun, Ortho's Vice-President for Scientific Affairs, appeared before the Subcommittee on

Health and Scientific Research of the Committee on Labor and Human Resources of the United States Senate ("the Senate Subcommittee"), which was at that time conducting hearings on fraud and abuse in the testing of new drugs on human subjects. While Braun had not been subpoenaed to testify, his appearance was pursuant to the Senate Subcommittee's specific request that someone from Ortho provide information about the clinical studies conducted on Suprofen for Ortho by Bio/Basics. Braun's testimony consisted of a prepared statement, which he read into the record with the permission of Senator Edward M. Kennedy, Chairman of the Senate Subcommittee, and also of answers to certain questions posed by Senator Kennedy."

Thus, it is clear that Ortho presented its statement not as a public officer, but rather as one performing the narrow 'governmental function' of voluntarily providing information on a subject being considered by a legislative subcommittee. It is significant that the remarks at issue here were not extemporaneous responses to legislative inquiries but rather were contained in a statement prepared well in advance of the subcommittee hearing. Moreover, defendant's limited function of providing unsubpoaned testimony did not fall within the scope of absolute privilege.

It is also apparent, that as a matter of New York Law, a distinction would also be made between a voluntary and non-voluntary witness' testimony before a legislative committee; an individual who makes voluntary statements before a legislative committee would be accorded a qualified privilege. *Andrews v. Gardiner,* 224 N.Y. 440 &1918). In *Andrews v. Gardiner, supra,* a libel action was brought against

an attorney who prepared a pardon petition addressed to the Governor; the petition allegedly recited defamatory charges against another attorney who had much to do with the prosecution of the individual seeking the pardon. The New York State Court of Appeals held that a qualified privilege, not an absolute one extended to a person preparing an application for a pardon. In so holding, Judge Cardoza stated at page 448:

> "There is no license, under cover of such an occasion, to publish charges known to be false or put forward for revenge. *We are not dealing here with statements made by witnesses required to attend a hearing (Prison Law, secs. 261, 262, 265): there is a distinction between the testimony of witnesses and voluntary complaints (Wright v. Lothrop, supra).* We do not go beyond the case before us. Our ruling is in harmony with the tendency of courts to restrict the scope of absolute privilege in libel *(Blakeslee v. Carroll, supra,* at p. 235; Odgers on Libel and Slander, pp. 230, 231). It is in harmony with rulings made where petitions have been submitted to the governor or the legislature for relief against oppression or the redress of other wrongs (*Wright v. Lothrop, supra,* at p. 390; *Proctor v. Webster, supra; Woods v. Wiman,* 122 N.Y. 445; *Cook v. Hill,* 3 Sandf. Supr. Ct. 341; *Maurice v. Worden,* 54 Md. 233); the oppression of a harsh or unjust judgment is not to be distinguished in this respect from any other abuse of power. The ruling gives just protection alike to suitor and to counsel and charges them with liability only when the privilege is abused." (*emphasis added*).

In addition, the primary basis of absolute privilege is "to insure freedom of speech where it is essential that freedom of speech exist." *Veeder, Ab-*

solute Immunity In Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 469 (1909). It has also been stated "that efficient democratic government requires a free disclosure of facts by public officials in official proceedings." *Note, Developments in the Law—Defamation,* 69 Harv. L. Review, 875, 917 (1956). While these policy considerations are perhaps ideally suited for formal judicial proceedings, they have come under attack when applied to witnesses who testify before legislative committees.

> "But the position of the witness before a committee is most vulnerable. The authority for the proposition that such a witness is absolutely protected from libel and slander suits is surprisingly scant. The Courts have not considered this privilege as an extension of that accorded the legislator but have based it on the analogy of the immunity granted statements by a witness in a judicial proceeding. Retrospectively, this development seems improper. Not only is remedial legislation desirable, but a persuasive argument can be directed against the rule in those courts where it has yet to be conclusively established.
>
> "The differences in the positions of judicial and legislative witnesses justify different rules of privilege. Enforcement of the rules of evidence, effective guarantees of thorough cross-examination, and the probability of a more impartial hearing in a judicial proceeding underline these differences. In addition there is a greater likelihood that all controverting evidence will be presented. Criminal prosecutions often must be initiated by a grand jury indictment and, unlike many committee investigations, legal proceedings are resolved by a final verdict which ordinarily will be given much more publicity and credence than charges made in the course of the trial. Moreover, the widespread publicity afforded legislative in-

vestigations gives the congressional witness a far greater power to harm than his legal counterpart. The limited procedural reforms proposed would by no means obliterate these differences. Privileges in the law of defamation are based on the belief that the benefits to the public of free speech will outweigh the harm which may result to individuals. But congressional investigations have upset this balance. Because of the greater probability of harm it is submitted that public policy will best be served if a greater measure of protection is accorded to the individual by conferring only a qualified privilege on congressional witnesses."

Note, Protection From Defamation in Congressional Hearings; 16 U. Chi. L. Rev. 544, 552-53 (1949); *See also, Note, Developments in the Law Defamation, supra* at p. 922.

Although Ortho's testimony was sought by the Senate Subcommittee, Ortho was not a disinterested citizen anxious to help the committee obtain information to aid the committee in its work. Ortho was an interested party. Its only concern was to disclaim any responsibility on its part for the testing procedures, and its interest was in making a public statement that it was plaintiff's testing work that was inadequate. In addition, Ortho was not only in the position of a witness who was attempting to fully answer, extemporaneously, the question being put by a legislator seeking information; Ortho's testimony consisted primarily of a statement prepared in advance of the Committee hearing—the matter complained of by plaintiff was contained in the prepared statement. Therefore, as a matter of New York law and public policy, the privilege accorded to Ortho's voluntary testimony before a subcommittee of the United States Senate should be qualified.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF THE SECOND CIRCUIT COURT OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-three.

Present:

HON. WILFRED FEINBERG, Chief Judge
HON. RICHARD J. CARDAMONE, Circuit Judge
HON. OSCAR H. DAVIS,* Circuit Judge.

BIO/BASICS INTERNATIONAL CORPORATION,

Plaintiff-Appellant,

v.

ORTHO PHARMACEUTICAL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

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* United States Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

1. Since both parties agree that New York law is controlling in this case, we decide the case on that basis. Bio/Basics argues that George A. Braun, Ortho's then vice-president for Scientific Affairs, had only a qualified privilege when he testified before a Senate subcommittee investigating fraud in drug testing, because he was testifying voluntarily rather than under a subpoena. We think Judge Ward was correct, however, when he found that although there is no New York case directly on point, it appear that a New York court would treat a witness's pertinent testimony before a legislative committee as absolutely privileged. See, e.g., Julien J. Studley, Inc. v. Lefrak, 50 AD.2d 162, 164-65 (2d Dep't 1975), aff'd, 41 N.Y.2d 881 (1977); Loudin v. Mohawk Airlines, Inc., 44 Misc. 2d 926, 927-28 (Sup. Ct. N.Y. Co. 1964), modified on other grounds, 24 A.D.2d 447 (1965). "Appellant cites *Andrews v. Gardiner,* 224 N.Y. 440 (1918), in support of its claim that voluntary testimony is entitled only to a qualified privilege. But *Andrews* involved statements made in an application for a pardon. At most, that case may suggest that someone who appears unasked before a legislative committee and is allowed to testify might be entitled only to a qualified privilege. In this case, however, Braun

appeared at the request of the Senate subcommittee. We believe that the distinction between a Senate request to testify and a subpoena to testify is insignificant in this context, sicne the committee that makes the request has the power to enforce it with a subpoena. Accordingly, we reject appellant's argument that to confer immunity on Braun would unnecessarily extend the scope of absolute privilege under New York law."

2. We have considered all of the appellant's arguments. None of them persuades us to reverse Judge Ward.

s/Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

s/Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judge

s/Oscar H. Davis
OSCAR H. DAVIS, Circuit Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

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SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

Opinion of the District Court for the Southern District of New York SA1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BIO/BASICS INTERNATIONAL CORPORATION,

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v.

ORTHO PHARMACEUTICAL CORPORATION,

Respondent.

SUPPLEMENTAL APPENDIX

OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 81 Civ. 4294 (RJW).

United States District Court,
S.D. New York

August 23, 1982

Complaint was filed alleging tortious interference with contract, tortious interference with precontractual relations, breach of fiduciary relationship, and defamation. The District Court, Robert J. Ward, J., held that under New York law, medical research organization could not base complaint on testimony of vice president of pharmaceutical company before

senate subcommittee concerning testing done by organization on company product.

Ordered accordingly.

1. Limitation of Actions (Key 30)

While plaintiff's action, commenced approximately 21 months after cause of action accrued, was time-barred insofar as it stated a claim for defamation or could be interpreted to state a claim for prima facie tort, it was not time-barred insofar as it stated claims for tortious interference with contractual and precontractual relations and breach of fiduciary duty as plaintiff's allegations stated paradigmatic tortious interference claims and thus permitted timeliness of those claims to be tested by normal three-year period of limitations. N.Y. McKinney's CPLR 215.3.

2. Limitation of Actions (Key 30)

Under New York law, rule that one-year period of limitations should be used to test timeliness of tortious interference claim whenever complaint alleges facts that would have supported defamation claim is only applied where plaintiff, in addition to alleging facts that would have supported defamation claim, has also failed to allege elements of a tortious interference claim, thereby permitting inference that plaintiff used tortious interference label simply as a vehicle to avoid application of one-year period of limitation that governs defamation actions. N.Y. McKinney's CPLR 215.3.

3. Federal Courts (Key 374)

Situations where federal common law may be developed fall into essentially two categories: those in which Congress has given courts power to develop substantive law and those in which federal rule of decision is necessary to protect uniquely federal interests.

4. Federal Courts (Key 418)

State law rather than federal law applied to case involving extent to which witness who appears before federal legislative committee is immune from subsequent lawsuit based upon his or her testimony to committee where Congress had not given courts power to develop substantive law on issue, action did not involve federal rule of decision necessary to protect uniquely federal interests, action was not a case involving United States as a party or directly implicating its rights and duties and thus was not a case where requisite foundation for creation of federal common law existed simply because of status of parties, and action did not implicate an identifiable substantive federal policy that supported a rule having particular substantive content.

5. Federal Courts (Key 374)

Even where federal interest in uniform rule is itself insufficient to trigger creation of federal common law, federal common law may be developed where legal issue before court implicates an identifiable substantive federal policy that supports a rule having a particular substantive content and application of state law would conflict with that policy.

6. Torts (Key 2)

Under New York choice of law principles, substantive law to be applied to decide an issue arising in a tort case is law of jurisdiction having most significant relationship with the issue.

7. Libel and Slander (Key 1)

Where multistate defamation action is brought by corporation, legal issues raised by case are generally governed by law of state where corporation has its principal place of business, as long as that state is also one of states where allegedly defamatory statement was published.

8. Federal Courts (Key 418)

Given the strength of New York's interest in issue of immunity of individual testifying before federal legislative committee considering corporation bringing action was located in New York, and weakness of District of Columbia's interest as only being the place where committee meeting was held, question of defendant's immunity from a lawsuit based on testimony before senate subcommittee would be decided by reference to New York law.

9. Libel and Slander (Key 37)

Under New York law, witness who appears before legislative committee is absolutely immune from lawsuit predicated on testimony that witness gave to committee.

10. Libel and Slander (Key 37)

Under New York law, any witness who appears before legislative committee is immune from subsequent lawsuit based on testimony that witness gave to committee unless witness' challenged testimony did not relate to subject matter of committee's inquiry or committee did not have power to subpoena witness to testify before it.

11. Torts (Key 12)

Under New York law, medical research organization could not base a complaint for tortious interference with contract, tortious interference with precontractual relations, or breach of fiduciary relationship, on testimony of vice president of pharmaceutical company before senate subcommittee concerning testing done by organization on company product where vice president's testimony related to subject matter of subcommittee's inquiry and subcommittee unquestionably had power to subpoena vice president to testify before it.

Rochman, Platzer & Fallick, New York City, for plaintiff; Barry M. Fallick, Sam Rosmarin, New York City, of counsel.

Patterson, Belknap, Webb & Tyler, New York City, Johnson & Johnson, Inc., New Brunswick, N.J., for defendant; Frederick T. Davis, New York City, James E. Farrell, Jr., New Brunswick, N.J., of counsel.

ROBERT J. WARD, District Judge.

The complaint filed in this diversity action sets forth six causes of action: two for tortious interference with contract; two for tortious interference with precontractual relations; one for breach of fiduciary relationship; and one for defamation. Plaintiff is Bio/Basics"), a New York corporation. Defendant is Ortho Pharmaceutical Corporation ("Ortho"), a New Jersey corporation. All six causes of action set forth in the complaint are based on certain statements made by an Ortho employee during his testimony before a United States Senate Subcommittee. Ortho now moves, pursuant to Rule 56, Fed. R. Civ. P., for an order granting summary judgment in its favor and dismissing the complaint. For the reasons hereinafter stated, Ortho's motion is granted.

I

The factual allegations of plaintiff's complaint, which the Court deems to be true for thepurposes of deciding defendant's summary judgment motion, may be summarized as follows. Ortho is a subsidiary of Johnson & Johnson, Inc., and is primarily engaged in the manufacture, distribution, and sale of pharmaceutical and medical products. Bio/Basics is a medical research and clinical product development organization. At the time it commenced this action, it had been in business for about eight years. Bio/Basics devotes its activities in large part to matters undertaken on behalf of companies, such as Ortho, that manufacture pharmaceutical products. Among other things, Bio/Basics offers its clients assistance in the testing of new therapeutic substances. The services that Bio/Basics customarily makes available to a client for this purpose include: (1) locating "clinical investigators" who are qualified and willing to engage

in testing new therapeutic substances; (2) furnishing administrative services necessary for such testing to be conducted; (3) forwarding the results of such testing to the client, that is, to the manufacturer of the substance being tested; and (4) communicating and consulting with the client on various matters relating to such testing.

Beginning in September 1975, Ortho and Bio/Basics entered into a series of contracts whereby Bio/Basics agreed to retain the clinical investigators necessary to conduct studies relating to the safety and efficacy in humans of a drug known as "suprofen." Suprofen is a non-narcotic analgesic agent designed to relieve mild to moderate pain. In these contracts, Bio/Basics further agreed to retain a group of recognized academic experts to conduct a "peer group review" of the studies of suprofen that were to be performed by the clinical investigators. The "clinical investigation" and "peer group review" that Bio/Basics agreed to conduct on Ortho's behalf were undertaken for the purpose of supporting a "New Drug Application" ("NDA") that Ortho intended to file with the Food and Drug Administration ("FDA") in order to gain FDA approval of suprofen for marketing to the general public in the United States. Bio/Basics alleges that it fully and properly performed all of its obligations under these contracts.

On October 11, 1979, George A. Braun, Ortho's Vice-President for Scientific Affairs, appeared before the Subcommittee on Health and Scientific Research of the Committee on Labor and Human Resources of the United States Senate ("the Senate Subcommittee"), which was at that time conducting hearings on fraud and abuse in the testing of new

drugs on human subjects. While Braun had not been subpoenaed to testify, his appearance was pursuant to the Senate Subcommittee's specific request that someone from Ortho provide information about the clinical studies conducted on Suprofen for Ortho by Bio/Basics. Braun's testimony consisted of a prepared statement, which he read into the record with the permission of Senator Edward M. Kennedy, Chairman of the Senate Subcommittee, and also of answers to certain questions posed by Senator Kennedy. In his prepared statement, Braun first described the aforementioned contractual relationship between Ortho and Bio/Basics. He then told the Senate Subcommittee that the clinical studies of Suprofen contemplated by the Ortho-Bio/Basics contracts had been completed by late 1977 and that Ortho had filed its NDA for Suprofen in October 1978. According to Braun, the FDA, in the course of processing Ortho's NDA for Suprofen, reviewed the data submitted by certain of the clinical investigators retained by Bio/Basics and advised Ortho that the data might be "worthless." Ortho responded to its receipt of this information, said Braun, by commencing a complete review of all the documents relating to the Bio/Basics study of suprofen. Braun's statement then asserted that Ortho's review of Bio/Basic's suprofen study showed that the "peer group review" contemplated by the contracts with Bio/Basics "had not been utilized as originally anticipated," and that "data from many of the [Bio/Basics] studies [were] not usable or [were] usable only to a limited extent."

Bio/Basics responded to Braun's testimony before the Senate Subcommittee by commencing this lawsuit. According to the complaint, Braun's statement to the Senate Subcommittee contained false and

misleading information and was made by Braun with the knowledge that it contained such information and with the intent of injuring Bio/Basics. Several existing and potential clients of Bio/Basics, located in various states of the United States, including New York, learned of Braun's statement to the Senate Subcommittee. As a direct result of Braun's statement, two clients of Bio/Basics, including one client located in New York, terminated their contracts with Bio/Basics, and two potential clients of Bio/Basics, one of which was located in New York, terminated their precontractual relations with Bio/Basics. The complaint alleges that Braun knew of these contractual and precontractual relationships when he made his statement to the Senate Subcommittee and that his statement was intended to interfere with those relationships. Accordingly, the complaint alleges that, by virtue of Braun's statement, Ortho tortiously interfered with contractual relations between Bio/Basics and its clients, tortiously interfered with precontractual relations between Bio/Basics and its potential clients, committee a breach of the fiduciary relationship between Bio/Basics and Ortho, and defamed Bio/Basics.

[1, 2] Ortho now moves, pursuant to Rule 56, Fed. R. Civ. P., for an order granting summary judgment in its favor on all six claims set forth in the complaint. In support of its motion, Ortho relies primarily[1] on the

1. Ortho also contends that it is entitled to summary judgment because (1) all of plaitiff's six causes of action are barred by the applicable statute of limitations, and (2) the statements that are the basis for each of plaintiff's six causes of action qualify for the "common-interest privilege." The Court finds neither argument persuasive. As regards the statute of limitations argument, the Court observes that this action was commenced on July 10, 1981, approximately twenty-one months after the cause of action

legal proposition that it is entitled to be found absolutely immune from suit with respect to each of

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accrued on October 11, 1979. Thus, while plaintiff's action is time barred insofar as it states a claim for defamation, *see* N.Y.Civ.Prac.Law §215.3 (imposing one-year period of limitation on defamation actions), or could be interpreted to state a claim for prima facie tort, *see Milone v. Jacobson*, 78 A.D.2d 548, 549, 432 N.Y.S.2d 30, 31 (2d Dep't 1980) (allegations sounding in defamation may not be labeled as stating a claim in prima facie tort and thereby avoid one-year period of limitation for defamation actions), it is not time barred insofar as it states claims for tortious interference with contractual and precontractual relations and breach of fiduciary duty. *See Frigi-Griffin, Inc. v. Leeds*, 52 A.D.2d 805, 806 & n.2, 383 N.Y.S.2d 339, 341 & n.** (1st Dep't 1976) (applying three-year period of N.Y.Civ. Prac. Law §214 to test timeliness of claim for tortious interference with contractual relations and six-year period of N.Y.Civ.Prac.Law §213 to test timeliness of claim for breach of fiduciary duty). The Court recognizes that there is broad language in some New York cases indicating that a one-year period of limitation should be used to test the timeliness of a tortious interference claim whenever the complaint alleges facts that would have supported a defamation claim. *See, e.g., Kartiganer Associates, P.C. v. Town of Newburgh*, 57 A.D.2d 857, 858, 394 N.Y.S.2d 262, 263 (2d Dep't 1977); *Noel v. Interboro Mutual Indemnity Insurance Co.*, 31 A.D.2d 54, 55, 295 N.Y.S.2d 399, 400 (1st Dep't 1968), *aff'd*, 29 N.Y.2d 743, 326 N.Y.S.2d 396, 276 N.E.2d 232 (1971). It appears, however, that this rule is only applied where the plaintiff, in addition to alleging facts that would have supported a defamation claim, has also failed to allege the elements of a tortious interference claim, thereby permitting an inference that the plaintiff used the tortious interference label simply as a vehicle to avoid application of the one-year period of limitation that governs defamation actions. *See Rupert v. Sellers*, 65 A.D.2d 473, 485-86, 411 N.Y.S.2d 75, 83 (4th Dep't 1978) (Cardamone, J., concurring), *aff'd*, 50 N.Y.2d 881, 430 N.Y.S.2d 263, 408 N.E.2d 671, *cert. denied*, 449 U.S. 901, 101 S.Ct. 272, 66L.Ed.2d 132 (1980); *Mishkin v. Dormer*, 57 A.D.2d 795, 795-96, 395 N.Y.S.2d 452, 453 (1st Dep't 1977). Here, plaintiff has alleged (1) the existence

plaintiff's six causes of action. Having set forth the necessary factual background, the Court now proceeds to analyze the legal merit of Ortho's immunity argument.

II

The briefs filed with the Court in this case disclose a vigorous dispute between the parties regarding the extent to which New York law immunizes a witness who appears before a legislative committee from a subsequent lawsuit based on his or her testimony to the committee. Plainly, this question of New York law is only controlling here if the immunity issue presented by this case is governed by New York law. Thus, the Court's first task is to decide what body of law governs the immunity of a witness who testifies before a federal legislative committee such as the Senate Subcommittee.

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of certain contracts and precontractual relations, (2) Ortho's knowledge of these contracts and precontractual relations, (3) Ortho's deliberate procurement of the breach of the contracts and the termination of the precontractual relations, and (4) damages resulting from Ortho's conduct. These allegations state paradigmatic tortious interference claims, *see Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 5, 134 N.E.2d 97, 99 (1956), and thus permit the timeliness of those claims to be bested by the normal three-year period of limitation.

As regards Ortho's claim that the "common-interest privilege" is available, the Court observes that this privilege is only a qualified privilege, being unavailable where the defendant is found to have acted with malice. *Brennan v. Granite Equipment Leasing Corp.*, 60 A.D.2d 877, 878, 401 N.Y.S.2d 275, 277 (2d Dep't 1978); *see Restatement (Second) of the Law of Torts* §596 (1976). Here, plaintiff has alleged that Braun's statements ot the Senate Subcommittee were made maliciously. Accordingly, summary judgment may not be granted in Ortho's favor on this theory.

A

The Court begins by considering the applicability of federal law. To be sure, there is no federal constitutional or federal statutory provision setting forth the extent to which a witness who appears before a federal legislative committee is immune from a subsequent lawsuit based upon his or her testimony to the committee. *Cf. Hutchinson v. Proxmire,* 443 U.S. 111, 123-22, 99 S. Ct. 2675, 2682-87, 61 L. Ed. 2d 411 (1979) (delineating scope of defamation immunity afforded members of Congress by "speech or debate clause," U.S. Const. art. I, §6); *Yessenin-Volpin v. Novosti Press Agency,* 443 F. Supp. 849, 854-57 (S.D..N.Y. 1978) (delineating scope of defamation immunity afforded foreign states by Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)). However, federal law would govern the immunity issue raised in this case, notwithstanding the absence of a controlling constitutional or congressional directive, if the facts of this case present one of the "few and restricted" instances, *see Wheelding v. Wheeler,* 373 U.S. 647, 651, 83 S. Ct. 1441, 1444, 10 L.Ed. 2d 605 (1963), where the courts are permitted to fashion and apply "federal common law" as the rule of decision.[2]

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2. The Court has found no case ruling whether federal common law governs the state-tort-law immunity of a witness who testifies before a federal legislative committee. Indeed, it has found no state or federal case where, as here, a witness's testimony before a *federal* legislative committee was the subject of a lawsuit based on a state law theory. Thus, the question whether federal law governs the immunity issue presented by this case is truly one of first impression. However, the Court of Appeals for this Circuit considered a closely analogous case in *King v. Hildebrandt,* 331 F.2d 476 (2d Cir. 1964). There, the defendant had testified, by way of affidavit, in a lunacy pro-

[3, 4] The situations where federal common law may be developed fall into essentially two categories: (1) those in which Congress has given the courts the power to develop substantive law, and (2) those in which a federal rule of decision is necessary to protect uniquely federal interests. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S. Ct.

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ceeding that had been commenced against the plaintiff in the United States District Court for the District of Columbia. The plaintiff, alleging that the affidavit was libelous, brought a diversity action in the United States District Court for the Southern District of New York. Both the district court, *see* 216 F.Supp. 814 at 816, and the court of appeals, *see* 331 F.2d at 478, held that the defendant's immunity defense was governed by "the law of the District of Columbia." The significance of this holding to the Court's adjudication of the instant case is rather uncertain, because the *King v. Hildebrandt* court, in choosing to apply District of Columbia law, mentioned only New York law as a possible alternative and did not expressly deal with the possibility of applying federal common law. However, if the *King v. Hildebrandt* court did intend to hold that state rather than federal law governs the state-tort-law immunity of a witness who testifies before a federal court, it would follow that state law governs the state-tort-law immunity of a witness who testifies before a federal legislative committee.

2061, 2066, 68 L.Ed. 2d 500 (1981).[3] The immunity issue raised by this case clearly does not fall in the first of these categories. This category of cases refers to situations where the court fashions federal common law in order to supplement a federal statutory program that itself embodies congressional policy determinations. In *re Agent Orange Product Liability Litigation*, 635 F.2d 987, 995 (2d Cir. 1980), *cert. denied*, ____U.S.____, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981); *see, e.g., Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S. Ct. 912, 917-918, 1 L.Ed.2d 972 (1957); *Owens v. Haas*, 601 F.2d 1242, 1248 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S. Ct. 483, 62 L.Ed. 2d 407 (1979); *Ivy Broadcasting Co. v. American Telephone (Telegraph Co.*, 391 F.2d 486, 491 (2d Cir. 1968). The instant case might fall in this category,

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3. The Court observes in passing that, were it to hold that Ortho's immunity from suit is to be decided by reference to federal common law, it would do no violence to the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Once it has been determined that federal common law governs a particular issue, federal common law supplies the rule of decision regardless of whether the issue turns up in a diversity action and regardless of whether the issue is susceptible of being characterized as "substantive" within the meaning of *Erie*. C. Wright, Handbook on the Law of Federal Courts, 285 (3d ed. 1976); *see, e.g., Francis v. Southern Pacific Co.*, 333 U.S. 445, 450, 68 S.Ct. 611, 613, 92 L.Ed. 798 (1948). The reasoning behind this proposition is simple enough: since federal common law is binding on both federal and state courts, *see, e.g., Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102-04, 82 S.Ct. 571, 576-577, 7 L.Ed.2d 593 (1962), a federal court hearing a diversity case acts "only [as] another court of the State," *see Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945), and thus does not transgress *Erie's* basic premise, when it applies federal common law to adjudicate a particular issue presented by the case.

then, if Congress had, without treating the precise immunity issue raised here, either enacted a federal defamation statute or granted the federal courts original jurisdiction of any action that seeks to recover damages caused by the testimony of a witness who appeared before a federally created body. However, since there has been no congressional enactment of this sort, the first category of federal-common-law cases cannot possibly be stretched to cover this case.

After careful consideration, the Court has concluded that this case is not covered by the second category noted above either. The second category of federal-common-law cases refers to those situations where federal common law is fashioned because the court identifies a particular federal policy or interest that is implicated by an issue raised in the case before it, and perceives a significant conflict between that policy or interest and the use of state law as the rule of decision. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313, 101 S. Ct. 1784, 1790, 68 L.Ed. 2d 114 (1981); *Miree v. DeKalb County*, 433 U.S. *25*, 31, 97 S. Ct. 2490, 2494, 53 L.Ed. 2d 557 (1977). In cases where the United States is a party or where its rights and duties are directly implicated, such a conflict is often easily found: the use of state law as the rule of decision in such cases would conflict with the federal government's interest in having uniform rules govern its rights and obligations. *In re Agent Orange Product Liability Litigation, supra*, 635 F.2d at 993; *see, e.g., United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S. Ct. 1604, 1606, 91 L.Ed. 2067 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67, 63 S. Ct. 573, 574-75, 87 L.Ed. 833 (1943). Even where the litigation does not directly implicate the rights and

duties of the United States, meaning that there is no paramount federal interest in uniformity for its own sake, the requisite conflict may be found by virtue of the existence of an identifiable *substantive* federal policy that creates a federal interest in a particular outcome different from the result that would pertain were state law applied. *In re Agent Orange Product Liability Litigation, supra,* 635 F.2d at 993-94; *see, e.g., Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n.6, 92 S. Ct. 1385, 1393 n.6, 31 L.Ed. 2d 712 (1972).

The instant action is not a case involving the United States as a party or directly implicating its rights and duties. Thus, this is not a case where the requisite foundation for the creation of federal common law exists simply because of the status of the parties. *Cf. Howard v. Lyons,* 360 U.S. 593, 597, 79 S. Ct. 1331, 1333, 3 L.Ed. 2d 1454 (1959) (holding that federal common law governs immunity of federal employees in defamation actions that challenge statements made by such employees in the course of their duties). Nonetheless, there is undeniably a federal interest in enabling witnesses who appear before federal legislative committees to know in advance the likelihood that their testimony will cause them to be subjected to tort liability. The Court, having carefully considered the relevant case law, has determined that this federal interest in uniformity and predictability of result is insufficiently paramount to provide a basis for the creation of federal common law. In *In re Agent Orange Product Liability Litigation, supra,* the Court of Appeals for this Circuit held that the federal interest in uniform treatment of veterans' claims against private United States companies for injuries suffered while serving in the United States military was, by itself, insufficient to justify

the creation of federal common law. 635 F. 2d at 993-94. Plainly, if an insufficient predicate for the development of federal common law inheres in the federal interest that the legal consequences of service in the United States military be uniform, no sufficient basis for creating federal common law exists simply by virtue of the federal interest that the legal consequences of service as a witness before a congressional committee be uniform.

[5] A noted, even where the federal interest in a uniform rule is itself insufficient to trigger the creation of federal common law, federal common law may be developed where (1) the legal issue before the court implicates an identifiable *substantive* federal policy that supports a rule having a particular substantive content, and (2) application of state law would conflict with that policy. The first prong of this test has not been satisfied here, however, because the Court has been unable to identify a *particular* substantive federal policy that is implicated by the immunity issue raised in this case. The immunity of a witness who appears before a legislative committee must be determined by striking a policy balance between (1) a concern not to impinge on the effectiveness of the committee's work by discouraging the witness from giving full and frank testimony and (2) a desire not to allow the witness to use the committee as a vehicle to injure an innocent third party. In a case involving testimony before a federal legislative committee, then, the federal government has two substantive interests that are in direct conflict with one another. Accordingly, the question of the immunity that should be accorded a witness who testifies before a federal legislative committee does not implicate an *identifiable* substantive federal policy that the federal

judiciary can serve by creating a *particular* substantive rule of federal common law; rather, it raises two conflicting federal interests that require an independent policy determination for their resolution. Such an independent policy determination is, absent a paramount federal interest in a uniform rule of law, not to be made by a federal district judge through the creation of federal common law. *See generally In re Agent Orange Product Liability Litigation, supra,* 635 F.2d at 994-95.[4]

B

[6, 7] Having determined that the immunity issue presented by this case is governed by state rather than federal law, the Court must now determine whether the applicable state law is that of the District of Columbia (as the situs of the allegedly defamatory statement) or of the State of New York (as the jurisdiction where Bio/Basics has its principal place of business and where some existing and potential Bio/Basics clients learned of the allegedly defamatory statement). In deciding this question, the Court is required to apply the choice-of-law rules of New York, the forum state. *Klaxon Co. v. Stentor Electric*

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4. The Court pauses to observe that the second prong of the test set forth above has not been satisfied here either. Since this is a case where the Court cannot identify a particular federal policy, but only a particular federal policy question, it is plainly impossible for the Court to consider whether any particular federal policy would be undermined were state law applied to determine Ortho's immunity. The absence of any demonstrable conflict between an identifiable federal policy and the result that would pertain were state law applied stands as an additional impediment to the creation of federal common law in order to decide the immunity question raised by this case.

Manufacturing Co., 313 U.S. 487, 496-97, 61 S. Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941). Under New York choice-of-law principles, the substantive law to be applied to decide an issue arising in a tort case is the law of the jurisdiction having the most significant relationship with the issue. *Nader v. General Motors Corp.*, 25 N.Y. 2d 560, 565, 307 N.Y.S. 2d 647, 651, 255 N.E. 2d 765, 768 (1970); *see Restatement (Second) of the Conflict of Laws* § 145 (1971). The New York courts have, in dealing with choice-of-law questions that arise in the context of defamation actions, generally fleshed out the case-by-case balancing test embodied in section 145 of the *Restatement* and endorsed in *Nader* by adopting the subsidiary rules that the *Restatement* sets forth for defamation actions. *See, e.g., Rudin v. Dow Jones & Co.*, 510 F. Supp. 210, 216 (S.D.N.Y. 1981). Under the *Restatement*, this action is a "multistate" defamation action, because it is based on an allegedly defamatory statement that was "published" (*i.e.*, communicated to third parties) in more than one state. *See Restatement (Second) of the Conflict of Laws* § 150 (1971). Where, as here, a multistate defamation action is brought by a corporation, the legal issues raised by the case are *generally governed by the law of the state where the corporation has its principal place of business, as long as that state is also one of the states where the allegedly defamatory statement was published. Id.* § 150(3). Thus, since the potential and existing Bio/Basics clients who learned of Braun's testimony before the Senate Subcommittee were located, among other places, in New York (the state of Bio/Basics' principal place of business), section 150(3) of the *Restatement* provides an arguable basis for the application of New York law to the immunity issue raised by this case.

However, while most issues arising in a multistate defamation action must, under section 150(3) of the *Restatement*, be decided by reference to the law of the state of the plaintiff's principal place of business if publication occurred in that state, this rule does not, in the Court's view, extend to the issue of whether the defendant who made the challenged statement is entitled to immunity. This particular issue strongly implicates not only the interests of the state where plaintiff has its principal place of business and where publication occurred, but also the interests of the state where the allegedly defamatory statement was made. That is, while the state where the plaintiff's business is principally located and where publication occurred can powerfully argue that its concern to strike a balance between protecting the plaintiff's reputation and encouraging free expression should entitle it to prescribe the controlling rule of law, the state where the defendant made the allegedly defamatory statement can contend, often with equal or greater force, that its law should provide the rule of decision, in order to accommodate its interest in affording the defendant assurance that certain statements will invariably be immune from a defamation challenge. *The Choice of Law in Multistate Defamation—A Functional Approach*, 77 Harv. L. Rev. 1463, 1482-83 (1964). *See also Restatement of the Conflict of Laws* § 382(2) (1934) ("[a] person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state"). Thus, while it recognizes that there is no New York case holding to this effect,[5] the Court

5. Indeed, while there are numerous cases from New York and elsewhere that discuss the application of modern choice-of-law methodology in the context of a defamation action, only a very few have involved an issue of privilege or immunity, *see, e.g., Jiminez v. Maritime Overseas Corp.*, 360 F.Supp. 142, 144

concludes that a New York court faced with an immunity defense raised in the context of a multistate defamation action brought by a corporation would determine the law applicable to that defense not by employing general rule set forth in section 150(3) of the *Restatement*, but rather by utilizing the case-by-case approach enunciated in section 145 of the *Restatement*. *See Restatement (Second) of the Conflict of Laws* § 163 (1971) (requiring application of section 145 to determine whether tort defendant is excused from liability by reason of privilege or immunity).

(8) While in many cases application of the approach set forth above will require a court to strike a close balance between the competing interests of two or more states, the peculiar facts of the instant case make it fairly easy for the Court to determine which state has the "most significant relationship" to the immunity issue presented here. While both New York and the District of Columbia have an interest in providing the governing law because of their relationship to the challenged conduct, their interests are not of comparable significance. New York's interest in having its law govern the immunity question is powerful indeed, for New York is not only where publication of the allegedly defamatory statement occurred, in part, but also where Bio/Basics, the alleged injured party, has its principal place of business. On the other hand,

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(S.D.N.Y. 1973), and none has separated the inquiry required to determine the law governing the immunity issue from the inquiry required to ascertain the law applicable to the other issues involved in the case. Such an issue-by-issue approach to choice-of-law problems is, of course, one of the fundamental principles of modern choice-of-law methodology. *See Restatement (Second) of the Conflict of Laws* §145, comment d (1971).

since Braun's allegedly defamatory testimony was given before a *federal* legislative committee, rather than a legislative committee constituted pursuant to the laws of the District of Columbia, the interest of the District of Columbia in havint *its* law govern the immunity question is minimal, at best, notwithstanding the fact that the challenged conduct was performed there. Thus, given the strength of New York's interest in the issue and the weakness of the District of Columbia's interest, the Court concludes that the question of Ortho's immunity from a lawsuit based on Braun's testimony before the Senate Subcommittee should be decided by reference to New York law.

III

[9] The courts of many states have adopted a general rule that a witness who appears before a legislative committee is absolutely immune from a lawsuit predicated on the testimony that the witness gave to the committee. *Restatement (Second) of the Law of Torts* § 590A (1976); *see, e.g., Scott v. McDonnell Douglass Corp.*, 37 Cal. App. 3d 277, 285-86, 112 Cal. Rptr. 609, 614-15 (1974); *Farish v. Wakeman*, 385 So. 2d 2, 2 (Fla. Dist. Ct. App.), *appeal dismissed*, 394 So. 2d 1151 (Fla. 1980); *Tocco v. Piersante, 69 Mich. App. 616, 245 N. W. 2d 356, 362 (1976); Jennings v. Cronin*, 256 Pa. Super. 398, 389 A. 2d 1183, 1185 (1978); *Logan's Super Markets, Inc. v. McCalla*, 208 Tenn. 68, 343 S. W. 2d 892, 894 (1961). While there is no New York case directly on point, the decided cases strongly indicate that a New York court would confer absolute immunity on a defendant sued because of his or her testimony before a legislative committee. *See, e.g., Julien J. Studley, Inc. v. Lefrak*, 50 A.D.2d 162, 164-65, 376 N.Y.S. 2d 200, 203-04 (2d Dept. 1975) (rule

of absolute immunity protects testimony given to state licensing agency) *aff'd*, 41 N.Y.2d 881, 393 N.Y.S.2d 980, 362 N.E.2d 611 (1977); *Loudin v. Mohawk Airlines, Inc.*, 44 Misc. 2d 926, 927-28, 255 N.Y.S.2d 302, 303-04 (Sup. Ct. N. Y. Co. 1964) (rule of absolute immunity protects testimony given to Civil Aeronautics Board), *aff'd in relevant part*, 24 A.D.2d 447, 447, 260 N.Y.S.2d 899, 900 (1st Dept. 1965). Accordingly, the Court holds, as a matter of New York law and subject to the exceptions discussed *infra*, that a witness who appears before a legislative committee is absolutely immune from a lawsuit predicated on the testimony that the witness gave to the committee.[6]

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6. One court has recently opined, without any citation to authority or persuasive analysis, that this rule of absolute immunity should shield a witness who appears before a legislative body from a subsequent claim of defamation, but not from liability under business-tort principles. *Domestic Linen Supply & Laundry Co. v. Stone*, 111 Mich.App. 827, 314 N.W.2d 773, 778 (1981). In explaining its holding, the *Domestic Linen* court reasoned simply that "[t]he broad defense of absolute privilege in legislative affairs grew out of the common law immunity from actions in defamation," whereas "[t]he business torts, for which entirely different causes of action exist, carry with them their own defenses." 314 N.W.2d at 778. In the Court's view, this analysis provides no persuasive justification for declining to carry the traditional rule of absolute immunity over to the business-tort context from the defamation context. Indeed, when one recalls that a business defamation such as allegedly occurred here was actionable at common law without proof either that the plaintiff suffered damages or that the defendant was at fault, *see* W. Prosser, *Handbook of the Law of Torts*, 757-59, 771-74 (4th ed. 1971), and contrasts that standard with the strict limitations that have traditionally been imposed on the business-tort causes of action, *see Israel v. Wood Dolson Co.*, *supra* note 1, it is apparent that the law has consistently protected the reputational interests served by the law of defamation with greater vigor than the pure-

Since all six of the claims set forth in plaintiff's complaint are concededly predicated in their entirety on the testimony that Braun gave to the Senate Subcommittee, *see* Plaintiff's Statement Pursuant to Local General Rule 9(g) [sic], Mar. 23, 1982, at Par. 1-5; *cf. Loudin v. Mohawk Airlines Inc., supra*, 44 Misc. 2d at 928, 255 N.Y.S.2d at 304 (rule of absolute immunity is inapplicable where, unlike the case here, statements before the Civil Aeronautics Board were subsequently reiterated in a private, non-testimonial context, causing plaintiff to suffer harm distinct from the harm caused by the original statements to the Civil Aeronautics Board), *rev'd on other grounds*, 24 A.D.2d 447, 447, 260 N.Y.S.2d 899, 900 (1st Dept. 1965), Ortho is entitled to be found immune with respect to each of these claims unless an exception to the general rule of absolute immunity applies.

The courts have generally recognized that the absolute immunity of a witness who appears before a legislative committee should not extend to statements bearing no relation to the proceedings of the committee. *Restatement (Second) of the Law of*

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ly economic interests that underlie such business torts as tortious interference with contract or tortious interference with precontractual relations. Under these circumstances, it is plain that a rule immunizing a defendant against a defamation action based on his or her statements before a legislative committee should *a fortiori* immunize that defendant against a business-tort action based on the same statements. In this Court's view, then, the rule enunciated in *Domestic Linen* is unsound and would not be followed by a New York court. Rather, a New York court would, upon finding Ortho entitled to absolute immunity with respect to plaintiff's defamation claim, recognize that plaintiff's business-tort claims are entirely predicated on the statements that are the basis for plaintiff's defamation claim and hold that the rule of absolute immunity bars plaintiff's business-tort claims as well.

Torts § 590A (1976); 50 Am. Jur. 2d *Libel and Slander* § 223 (1970); 53 C.J.S. *Libel and Slander* § 105 (1948); *see, e.g., Kelly v. Daro,* 47 Cal. App. 2d 418, 118 P. 2d 37, 40 (1941); *Logan's Super Markets, Inc. v. McCalla, supra,* 343 S.W.2d at 894. Since this exception is supported by sound policy considerations, *see* W. Prosser, *Handbook of the Law of Torts* 778-79 (4th ed. 1971), the Court believes that it would be adopted by a New York court in an appropriate case. *Cf. Wolf v. Musnick,* 84 A.D.2d 503, 503, 443 N.Y.S.2d 230, 231 (1st Dept. 1981) (holding that a witness who testifies before a judicial proceeding is entitled to immunity only if "the [challenged] statements [were] material or pertinent to the issues"). However, since the testimony at issue here concededly related to the subject matter of the Senate Subcommittee's inquiry, *see* Defendant's Statement Pursuant to Local Civil Rule 3(g), Mar. 2, 1982, at Par. 3, this exception has no applicability to the instant case.

One court has held that the rule of absolute immunity should not apply where the defendant was not subpoenaed to testify before the legislative committee. *Fiore v. Rogero,* 144 So. 2d 99, 103 (Fla. Dist. Ct. App. 1962). To be sure, the policy considerations that support a rule granting absolute immunity to a witness who appears before a legislative committee are most strongly presented where the committee was empowered to compel the witness to testify. *See Restatement (Second) of the Law of Torts* §588, comment a (1976) ("[t]he compulsory attendance of all witnesses in judicial proceedings makes the protection [of absolute immunity] the more necessary").[7]

7. The comments to section 588 of the *Restatement,* entitled "Witnesses in Judicial Proceedings," are fully applicable to section 590A of the *Restatement,* entitled "Witnesses in Legislative Proceedings." *See Restatement (Second) of the Law of Torts* §590A, comment a (1976).

However, if absolute immunity were afforded only to those witnesses who refused to testify before a legislative committee unless subpoenaed, potential witnesses would be discouraged from voluntarily cooperating with the committee. *See Jennings v. Cronin, supra,* 389 A. 2d at 1185 n.2. The Court therefore believes that a New York court would confer absolute immunity upon any witness who appears before a legislative committee having the subpoena power, and not merely upon witnesses who force the committee to exercise that power. *See Loudin v. Mohawk Airlines, Inc., supra,* 44 Misc. 2d at 927-28, 255 N.Y.S.2d at 303-04 (conferring absolute immunity on defendants, upon finding that challenged testimony was given before an entity "ha[ving] the power of subpoena," without inquiring whether defendants themselves testified pursuant to a subpoena). Since a committee such as the Senate Subcommittee unquestionably has the power to subpoena witnesses to testify before it, *see* 2 U.S.C. §190b(a), Ortho's entitlement to absolute immunity is not affected by the fact that Braun did not testify before the Senate Subcommittee pursuant to a subpoena.

[10, 11] In sum, the Court holds, as a matter of New York law, that any witness who appears before a legislative committee is immune from a subsequent lawsuit based on the testimony that the witness gave to the committee, unless (1) the witness's challenged testimony did not relate to the subject matter of the committee's inquiry, or (2) the committee did not have the power to subpoena the witness to testify before it. Here, then, since all six of plaintiff's causes of action are based on Braun's testimony before the Senate Subcommittee, since Braun's testimony concededly related to the subject matter of the Senate Subcom-

mittee's inquiry, and since the Senate Subcommittee's unquestionably had the power to subpoena Braun to testify before it, Ortho is absolutely immune from suit with respect to each of plaintiff's six causes of action.

IV

Ortho is, under New York law, absolutely immune from suit with respect to each of plaintiff's six causes of action. Accordingly, Ortho's motion for summary judgment is granted. The complaint is dismissed in its entirety.

It is so ordered.